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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1021.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES OF SEABOARD AIR LINE RAILWAY COMPANY,

Petitioners,

against

MARYLAND TRUST COMPANY, AS SUCCESSOR TRUSTEE UNDER THE FIRST MORTGAGE OF SEABOARD AIR LINE RAILWAY DATED APRIL 14, 1900,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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May 21, 1942.

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INDEX.

	PAGE
PRELIMINARY STATEMENT	1
ARGUMENT	2
CONCLUSION	9

TABLE OF CASES CITED.

Erie Railroad Company v. Tompkins, 304 U. S. 64	7
Gemmel v. Davis, 75 Md. 546, 23 Atl. 1032	4
Quinn v. Safe Deposit & Trust Co., 93 Md. 285, 48 Atl. 835	6
Smith v. Hooper, 95 Md. 16, 51 Atl. 844	5, 6
Spooner v. Phillips, 62 Conn. 62, 24 Atl. 524	5
Stentor Electric Mfg. Co., Inc. v. Klaxon Co., 125 Fed. (2d) 820	2, 3, 9
Thomas v. Gregg, 78 Md. 545, 28 Atl. 565	6
West v. American Tel. & Tel. Co., 311 U. S. 223	3

STATUTES CITED.

Annotated Code of Public General Laws of Md. (Flack's 1939 Edition), Article 75B	7

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PRELIMINARY STATEMENT.

On the 27th day of April, 1942, this Court denied the petition of Legh R. Powell, Jr. and Henry W. Anderson, as Receivers of the Properties of Seaboard Air Line Railway Company, for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit in this case. On May 18, 1942, the Receivers filed herein a petition praying that a rehear-

ing be had upon their original petition, alleging as grounds therefor a conflict between the decree of the United States Circuit Court of Appeals for the Fourth Circuit and the recent decision of the Circuit Court of Appeals for the Third Circuit in the case of Stentor Electric Mfg. Co., Inc. v. Klaxon Co., 125 Fed. (2d) 820. Believing the Receivers' assignment of grounds for a rehearing to be without merit, counsel for respondent, Maryland Trust Company, take this opportunity to file a short brief in opposition.

The jurisdiction of this Court to hear this cause, the opinions of the courts below and the facts of this case have been set forth in the respondent's brief filed in opposition to the Receivers' original petition and need not be repeated herein.

This Court is respectfully requested to treat this brief as an answer to the petition filed May 18, 1942 by the Refunding Mortgage Trustee for a rehearing of their original petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit in this case, this petition being filed in Case No. 1075 entitled: "New York Trust Co., Trustee, etc., vs. Maryland Trust Co., Trustee, etc." The issues raised in the two petitions for a rehearing are substantially the same and it is believed that the respondent's brief herein is an adequate answer to both.

ARGUMENT.

As stated, the sole ground assigned by the Receivers in justification of their petition for a rehearing of this matter is an alleged conflict between the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the case at bar and the Klaxon Company case. The opin-

ion in that case was rendered on February 9, 1942 and was published in the Federal Reporter, under date of April 6, 1942. Three weeks elapsed between the publication of this decision and the order of this Court dated April 27, 1942, denying the Receiver's petition for a writ of certiorari, during which time the Receivers had ample opportunity to bring this decision to the attention of this Court. No reason is given for their failure to take this action and it hardly seems fitting that they should be permitted to do so now after this Court has entered its order denying their petition and after the mandate of the Circuit Court of Appeals for the Fourth Circuit has been handed down to the District Court for the Eastern District of Virginia.

Leaving aside the question of delay, however, and taking up the merits of the Receivers' petition, it is respectfully submitted that the alleged conflict between the two cases is without foundation. In the first place, the facts are entirely dissimilar. In the Klaxon Company case, after the remand of that case to the Circuit Court of Appeals for the Third Circuit, the sole question was whether under the conflict of laws rule prevailing in Delaware, reference was properly made to a New York statute providing for interest in actions for breach of contract. The suit was for damages for breach of a contract which was to be performed in the State of New York. Despite the assertion of counsel to the contrary, there was no Delaware decision squarely in point. Following the admonition of this Court in the case of West v. American Tel. & Tel. Co., 311 U. S. 223, 237, 61 S. Ct. 179, the Circuit Court of Appeals for the Third Circuit directed its efforts to ascertain the law of Delaware "from all the available data".

In the case at bar, while the facts are quite different from the Klaxon Company case, still the question before the

Circuit Court of Appeals for the Fourth Circuit was in one important respect the same, namely, the problem of ascertaining state law (here the law of Maryland) in the absence of a decision squarely in point. The question for determination was whether the Maryland Trust Company, as First Mortgage Trustee, was entitled to 2,225 shares of the Richmond-Washington Company stock declared as a stock dividend upon shares of stock held in pledge under the Mortgage, there being a reservation of "dividends" in favor of Seaboard Air Line Railway as pledgor. That there is no Maryland case precisely in point has been conceded at every stage of this controversy (R. pp. 145, 204, 221).

The majority of the court in the case at bar thereupon proceeded to ascertain the law of Maryland from all available data. As Judge Parker observed, had there been no reservation of dividends in favor of Seaboard Air Line Railway, the First Mortgage Trustee as pledgee would clearly have been entitled to all dividends. The case of Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, is a square decision in point. The Court of Appeals there said:

> "As between vendor and vendee of shares of stock it is the settled rule that the vendee is entitled to all the dividends on the stock which are declared after the sale of the stock. In other words, dividends belong to the person entitled to the stock when the dividends are declared. Abercrombie v. Riddle, 3 Md. Ch. 320. Even though the transfer has not been recorded, the transferee has a right to the dividends, as against the transferer. Cook on Stockholders, sec. 541. A pledgee is protected in the same way as a purchaser of stock, Ib., sec. 432, and consequently dividends declared during the continuance of the pledge belong to him, though he is not registered as owner on the corporate books. Cook, sec. 468; Hill v. Newichawanick Co., 71 N. Y. 593."

The cases make no distinction between stock and cash dividends. Both belong to the pledgee in the absence of a reservation to the contrary. This has been conceded by the Receivers. Furthermore, the Maryland Court of Appeals has unqualifiedly held that the word "dividends", if standing alone, means dividends payable in money. In Smith v. Hooper, 95 Md. 16, 51 Atl. 844, Chief Judge McSherry, speaking for the court, adopted the meaning given to the word "dividend" by the Court of Appeals of Connecticut in the case of Spooner v. Phillips, 62 Conn. 62, 24 Atl. 524. The Chief Judge said at page 26 of the Maryland report:

> " 'The word "dividend", if unqualified,' said the Supreme Court of Errors of Connecticut, 'signifies dividends payable in money. The word "income" has a broader meaning, but hardly broad enough to include things not separated in some way from the principal.' "

The rationale of these cases is clear. As Seaboard Air Line Railway reserved only "dividends" upon the pledged securities, the stock dividends in question, not being a dividend payable in money, must go under Maryland law to the Maryland Trust Company as pledgee.

While admitting that there is no precise Maryland decision in point, the Receivers complain that the majority should have applied the Maryland trust rule of apportionment. The answer is that the majority felt this rule to be entirely inapplicable to a pledge situation. In the case of a pledge there is a debtor-creditor relationship and the pledgor is entitled only to such cash or stock dividends as may have been expressly reserved under the contract of pledge. The issue thus turns upon the precise legal meaning of the word "dividends" as used in the reservation under the First Mortgage. The trust cases relied upon by the Receivers turn upon other principles and unmistakably show an effort on the part of the Maryland courts

to allocate stock dividends equitably between life tenant and remaindermen. These cases do not say what is or what is not a dividend and the Maryland Court of Appeals has recognized this fact. Speaking of these cases, two of which, Quinn v. Safe Deposit & Trust Co., 93 Md. 285, 48 Atl. 835, and Thomas v. Gregg, 78 Md. 545, 28 Atl. 565, are cited by the Receivers as their chief support, the Maryland Court of Appeals, in the case of Smith v. Hooper, supra, said at page 25:

> "It may not be out of place, before proceeding to solve that inquiry, to advert for a moment to several cases referred to in the argument. They are Quinn v. Safe Deposit and Trust Co., 93 Md. 285; Burt v. Gill, 89 Md. 152, and Thomas v. Gregg, 78 Md. 555. Those cases mainly determine, *not what is income or what are dividends*, but to whom income and dividends, confessedly such, belonged. *In the case at bar there is no dispute as to who is entitled to this increase if it be income or dividends, but the question is, does that increase constitute income or dividends at all? Obviously, therefore, the cases just referred to have no direct bearing upon this investigation.*" (Italics ours.)

Whether the majority was correct in rejecting the Maryland trust apportionment rule cannot be known until a Maryland court has passed upon the precise question. Their opinion, however, is fortified by the fact that both the District Court and the Special Master reached a similar conclusion. This is to be said for the opinion of the majority. Neither the dissenting Judge nor the Receivers can point to a single Maryland case which intimates, directly or indirectly, that the trust apportionment rule is applicable to a pledge situation. Indeed, the contrary is indicated in the quotation from Smith v. Hooper, supra. The reasons why the trust rule is applicable have been

summarized in the respondent's brief in answer to the Receivers' original petition, beginning at page 21. The point is moot in a sense because the Maryland Legislature in 1939 discarded the trust apportionment rule in favor of the Federal or Massachusetts rule. See Flack's Annotated Code of Maryland, Vol. II, Art. 75B. All stock dividends are now allocated in their entirety to the trust corpus. Clearly, therefore, if the issue in this case were to arise today, there would be no basis whatever for the Receivers' argument. It follows also that to inject the apportionment rule again into Maryland law can only lead to conflict and confusion.

To construe the case of Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, as requiring a Federal court under the circumstances of this case to follow a rule of law which the court is convinced is inapplicable to the matter to be decided would result in a flagrant miscarriage of justice. The majority cannot be charged with failing to give full scope to the Maryland law. All the Receivers and the dissenting Judge can say is that they disagree with the conclusion reached by the majority, but that is hardly a matter for review by this Court. It certainly does not raise an issue under the Erie Railroad Company case.

Before concluding, it is pertinent to make one further observation. The majority rests its conclusion mainly upon the construction to be given to the reservation of dividends in favor of the Seaboard Air Line Railway Company under the First Mortgage. Judge Parker's opinion goes further, however, and indicates clearly that the court felt there were other grounds to support the conclusion reached, namely, the circumstances surrounding the execution of the Mortgage and the intention of the framers

of that instrument. It was said in the opinion of the majority:

> "We think the answer to this must be in the negative, *both because a contrary interpretation would be unreasonable in the light of surrounding circumstances,* and because, *even in the absence of such circumstances,* a stock dividend is not ordinarily included in the term 'dividends' as contained in a contract relating to dividends, in the absence of a clear indication that it was intended that they should be so included." (Italics ours.)

And further:

> "In the light of these authorities *as well as of the circumstances surrounding the transaction,* we think there can be no doubt but that the reservation of dividends on the stock pledged should be construed not to include the stock dividends, * * *" (Italics ours.)

Among the circumstances reflecting an intent that the First Mortgage Trustee should have all stock dividends is the fact that any other conclusion would materially depreciate the value of the pledge. To award the 50% stock dividend to the Receivers of Seaboard Air Line Railway Company lessens the pledge from a one-sixth interest in favor of the Trustee to a one-ninth interest, thus dislodging the Trustee's position of parity with the five other competing railway companies owning all of the capital stock of the Richmond-Washington Company. As the majority properly concluded, the First Mortgage shows a clear intention to preserve, not to impair, the interest of the pledgee in the pledged securities. It is hardly to be supposed, therefore, that the Railway Company was intended to have a stock dividend in the absence of a clear provision to this effect, certainly not a stock dividend of the size and character of the one in question. The proper construction

of the First Mortgage in this respect presents a problem of first impression and, while theoretically a question of local law, must be answered in the final analysis by the court before whom the issue arises. No Maryland decisions are of any particular help. It is, therefore, submitted that the majority's conclusion upon this aspect of the case should not be disturbed in the absence of compelling reasons.

Whatever view may be taken with respect to the Klaxon Company case, certainly that decision presents no reasons justifying a review of the second of the questions raised by the Receivers pertaining to the scope and effect of the lien in favor of the holders of the Receivers' Certificates. As observed in the original brief filed on behalf of the respondent, the answer to that question depends wholly upon a consideration of the Receivers' applications Nos. 19, 63 and 160 for the issuance of Receivers' Certificates (R. 87, also 174 and 122) and the orders of the District Court entered thereon. In view of this fact and the further fact that Judge Soper's dissenting opinion does not question the soundness of the majority's conclusion, it is submitted that the Receivers' request for a review of this issue should be denied.

CONCLUSION.

In conclusion, respondent respectfully submits that the Receivers have failed to present any grounds justifying a review of either of the questions presented in their petition for a rehearing of their original petition for a writ of certiorari. Particularly is this true of the question pertaining to the lien of the Receivers' Certificates. If the review is granted, it should be limited to the first question raised in their petition which deals with the effect under

Maryland law of the reservation of dividends in favor of Seaboard Air Line Railway Company under the First Mortgage.

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